Supreme Court, U.S.
FILED

04 114 MAY 21

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

J.A. JONES MANAGEMENT SERVICES, INC. T/A JONES MANAGEMENT SERVICES, INC. AND VASPOLI CUSTOM BUILDERS, INC. T/A VASPOLI CUSTOM BUILDERS,

Petitioners

v.

MARK ROMA, AND HIS WIFE, MELANIE ROMA

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOHN R. GERCKE, ESQUIRE
COUNSEL OF RECORD
GERCKE, DUMSER & SIERZEGA
1236 BRACE ROAD, SUITE E
CHERRY HILL, NJ 08034
(856) 795-5800

QUESTIONS PRESENTED FOR REVIEW

I. Was it proper for the 3rd Circuit Court of Appeals to interpret a New Jersey Statute, N.J.S.A. 2A:62A-21 (the "Fireman's Rule"), in direct conflict with the New Jersey Court of Appeals, thereby creating a conflict of interpretation of N.J.S.A. 2A:62A-21 between New Jersey State Courts and Federal Courts?

II. Was it proper for the 3rd Circuit Court of Appeals to consider whether the decision of the New Jersey Appellate Division was in conflict with the New Jersey State Statute when this issue was not raised before the United States District Court?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Vaspoli Custom Builders, Inc. makes the following disclosure:

1) All parent corporations:
Vaspoli Custom Builders, Inc.
18 Sycamore Drive
Blenheim, NJ 08012

2) There are no publicly held companies that hold 10% or more of the party's stock.

John R. Gercke, Esquire
Counsel for Vaspoli Custom Builders, Inc.

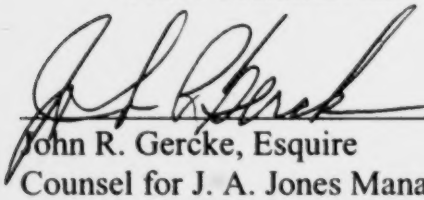
CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, J. A. Jones Management Services, Inc. makes the following disclosure:

1) All parent corporations:
Phillipp Holzmann AG, Taunusanlage 1
60299 Frankfurt am Main Germany

2) All publicly held companies that hold 10% or more of the party's stock:
Phillipp Holzmann AG, Taunusanlage 1
60299 Frankfurt am Main Germany

3) Publicly held company which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding:
Phillipp Holzmann AG, Taunusanlage 1
60299 Frankfurt am Main Germany



John R. Gercke, Esquire
Counsel for J. A. Jones Management Services, Inc.

TABLE OF CONTENTS

Citations Of The Reports Of The Opinions And Orders Entered.....1

Statement of the Basis For Jurisdiction.....2

Citation of N.J.S.A. 2A:62A-21.....3

Statement of the Case Pursuant to Rule 14(g).....4

Argument in Support of Petition..... 6

I. The Third Circuit Should Have Given Greater Deference To the State Court's Intermediate Appellate Decision In Kelly v. Ely 6

II. The Court Should Not Have Considered Whether Kelly v. Ely Was In Conflict With N.J.S.A. 2A:62A-21 As This Issue Was Not Raised Before The United States District Court 13

Conclusion..... 16

TABLE OF AUTHORITIES

Cases

C.I.R. v. Bosch's Estate, 787 U.S. 456, 465 (1967).....12

City of Pittsburgh v. Jonathan Clark & Sons Co., 154 F. 464 (3rd Cir. 1907).....14

Claudio v. Scully, 982 F.2d 798, 811 (2nd Cir. 1992).....12

Commercial National Bank of Philadelphia, PA v. Reber, 74 F.2d 301 (3rd Cir. 1934).....14

CPC Intern, Inc. v. Northbrook Excess and Surplus Insurance Co., 962 F.2d 77, 88 (1st Cir. 1992).....12

Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940).....4, 7, 9, 10, 11, 12

Government of Virgin Islands v. Smith, 949 F.3d 229 (3rd Cir. 2002).....15

Hamme v. Dreiss and Crump Mfg. Co., 716 F.2d 152, 156 (3rd Cir. 1982).....4, 12

In re: Orso, 219 B.R. 402, 439 (Bankr. M.D. La., 1998).....12

In the Matter of Linda Coal and Supply Company, 255 F.2d 653 (3rd Cir. 1958).....14

Johnson v. Rosemeyer, 117 F.3d 104, 108 (3rd Cir. 1997).....12

Kelly v. Ely, 336 N.J. Super. 354 (App. Div.), certif. den. 167 N.J. 635 (2001).....4, 6, 8, 12, 13, 16

Kleman v. Anheuser-Busch Brewing Ass'n, 237 F. 993 (3rd Cir. 1916).....14

Osei-Afriyie by Osei-Afriyie v. Medical College, 973 F.2d 876 (3rd Cir. 1991).....15

Pentech Intern, Inc. v. Wall Street Clearing Co., 983 F.2d 441, 445 (2nd Cir. 1993).....12

Six Companies of California v. Joint Highway District, 311 U.S. 180 (1940).....7

Stoner v. New York Life Insurance Company, 311 U.S. 464 (1940).....7

The Blakeley, 285 F. 348 (3rd Cir. 1923).....14

US v. Thame, 846 F.2d 200 (3rd Cir. 1988).....15

US v. Turcks, 41 F.3d 893 (3rd Cir. 1994).....15

US v. Young, 470 U.S. 1 (1985).....15

U.S. Underwriters Insurance Company v. Liberty Mutual Insurance Company, 80 F.3d 90, 93 (3rd Cir. 1996).....6

Weinstein v. Laughlin, 21 F.2d 740 (8th Cir. 1927).....14

West v. AT&T Co., 311 U.S. 223 (1940).....4, 7, 8, 11

Statutes

28 U.S.C. Sec. 1254.....2

28 U.S.C. Sec. 1291.....2

28 U.S.C. Sec. 1367.....4

N.J.S.A. 2A:62A-21.....3, 4, 6, 9, 12, 13

Other

FN1 Chapter 40, New Jersey Session Laws of 1932, Section 1.....10

CITATIONS OF THE REPORTS OF THE OPINIONS AND ORDERS ENTERED

Precedential Opinion of the United States Court of Appeals for the Third Circuit entered September 16, 2003

Order of the United States Court of Appeals for the Third Circuit Denying Petition For Panel Rehearing dated February 25, 2004

STATEMENT OF THE BASIS FOR JURISDICTION

The present *writ of certiorari* seeks to review the Order denying the Petition for Rehearing entered by the United States Court of Appeals for the Third Circuit on February 25, 2004. The Third Circuit had jurisdiction pursuant to 28 U.S.C. Sec. 1291. This Petition for Rehearing was timely filed after the decision of the United States Court of Appeals for the Third Circuit in Roma v. U.SA., et al., No. 02-3820, filed on September 16, 2003. This Court has jurisdiction pursuant to 28 U.S.C. Sec. 1254.

CITATION OF N.J.S.A. 2A:62A-21

In addition to any other right of action or recovery otherwise available under law, whenever any law enforcement officer, firefighter, or member of a duly incorporated first aid, emergency, ambulance or rescue squad association suffers any injury, disease or death while in the lawful discharge of his official duties and that injury, disease or death is directly or indirectly the result of the neglect, willful omission, or willful or culpable conduct of any person or entity, other than that law enforcement officer, firefighter or first aid, emergency, ambulance or rescue squad member's employer or co-employee, the law enforcement officer, firefighter, or first aid, emergency, ambulance or rescue squad member suffering that injury or disease, or, in the case of death, a representative of that law enforcement officer, firefighter or first aid, emergency, ambulance or rescue squad member's estate, may seek recovery and damages from the person or entity whose neglect, willful omission, or willful or culpable conduct resulted in that injury, disease or death.

STATEMENT OF THE CASE PURSUANT TO RULE 14(g)

The United States District Court exercised jurisdiction over this matter as the Plaintiffs presented a claim based upon the Federal Tort Claims Act. The accompanying claims of the Plaintiffs against the appellants in this matter, requiring application of the substantive law of the State of New Jersey, were before the District Court as matters of pendent jurisdiction under 28 U.S.C. Sec. 1367.

In reversing the ruling of the United States District Court, the Third Circuit Court of Appeals entered a decision directly in conflict with the United States Supreme Court decisions in West v. AT&T Co., 311 U.S. 223 (1940) and Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940) and the decision of the Court of Appeals for the Third Circuit in Hamme v. Dreiss and Crump Mfg. Co., 716 F.2d 152, 156 (3rd Cir. 1982). The decision, if left intact, will result in two different rules of law in the State of New Jersey to interpret the same statute, one for the state courts and one for the federal courts.

Defendants/Appellees Vaspoli and Jones hereby request a *writ of certiorari* from the United States Supreme Court. The Third Circuit Court of Appeals has determined that Kelly v. Ely, 336 N.J. Super. 354 (App. Div.), certif. den. 167 N.J. 635 (2001) incorrectly interpreted N.J.S.A. 2A:62A-21 so as to allow continued

viability of the rule that an owner or occupier is not liable to a fireman for negligence with respect to creation of a fire (Fireman's Rule). The Court of Appeals' interpretation of the statute precludes the immunity of the Fireman's Rule.

ARGUMENT IN SUPPORT OF PETITION

I. The Third Circuit Should Have Given Greater Deference To the State Court's Intermediate Appellate Decision In Kelly v. Ely.

The central issue in this matter, concerning which these defendants petition this Court, has now become whether the panel of the New Jersey Appellate Division in Kelly v. Ely correctly interpreted N.J.S.A. 2A:62A-21 and concluded that the Fireman's Rule was viable. Other than to deny certification of Kelly v. Ely, the Supreme Court of New Jersey has never decided the issue.

The Third Circuit, beginning at page 13 of its opinion, observed that the New Jersey Supreme Court has never interpreted N.J.S.A. 2A:62A-21. Accordingly its task, "in reviewing the District Court's interpretation of that statute," is to predict how the New Jersey Supreme Court would rule. The Court then cited U.S. Underwriters Insurance Company v. Liberty Mutual Insurance Company, 80 F.3d 90, 93 (3rd Cir. 1996) for the proposition that in so predicting, it must according significant weight to intermediate state appellate court decisions. It is respectfully submitted that the weight given to the appellate court's ruling in Kelly v. Ely was insufficient based upon principles of federalism and clear authoritative precedent.

The United States Supreme Court has held that federal courts are obligated to follow decisions of lower state courts in the absence of decisions of the state Supreme Court showing that the state law is other than as

announced by the lower courts. Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940); West v. AT&T Co., 311 U.S. 223 (1940); Six Companies of California v. Joint Highway District, 311 U.S. 180 (1940); Stoner v. New York Life Insurance Company, 311 U.S. 464 (1940).

In West v. AT&T, supra, the remaindermen of a trust filed an action in Ohio state court to correct title to stock certificates which the life estate holder had transferred to a third party in derogation of the trust agreement. The remaindermen were successful at the trial level. However, an Ohio state intermediate court of appeals, in interpreting an applicable statute, determined that the cause of action of the remaindermen had not yet accrued since they had failed to perform one of the statutory prerequisites: a demand and refusal to recognize their rights in the stock certificates. Significantly, the remaindermen attempted to appeal this decision to the Ohio Supreme Court which denied certification. Subsequently, the remaindermen fulfilled the statutory prerequisite and filed suit, this time in the United States District Court. The District Court entered judgment in their favor. However, on appeal, the Circuit Court of Appeals interpreted the applicable statutory provision contrary to the intermediate state court's interpretation. It held that the remaindermen's rights had accrued much earlier, and their cause of action was barred by limitations and laches.

The United States Supreme Court reversed the Court of Appeals. It did not spend any significant amount of time analyzing whether the Ohio intermediate appellate court's interpretation of the statute was correct or reasonable. Rather, it concluded in a perfunctory

manner that the Court of Appeals should have deferred to the state appellate court since the Ohio Supreme Court had not ruled on the issue. The United States Supreme Court reiterated the importance of avoiding the creation of two divergent or conflicting systems of law in the same state, one in the state system and one in the federal court system. It further stated:

> That object would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state had not spoken. 311 U.S. 223, 236.

The Supreme Court held that the judgment of the intermediate appellate state court is not to be disregarded by a federal court unless it is convinced by other persuasive data that the state's highest court would decide otherwise.

> This is the more so where, as in this case, the highest court has refused to review the lower court's decision rendered in one phase of the very litigation which is now prosecuted by the same parties before the federal court. 311 U.S. 223, 237.

The New Jersey Supreme Court denied certification in Kelly v. Ely. That case presented a clean set of facts upon which the New Jersey Supreme Court could have expressed a judgment different from the appellate panel if it felt it appropriate to do so. West v. AT&T, supra, establishes this as a very important factor which the Court of Appeals must take into consideration. During oral

argument of this matter, the Third Circuit dismissed this as a factor, suggesting there could be any number of reasons the state Supreme Court would deny certification. The Third Circuit's written opinion does not address the issue.

The Third Circuit in its opinion relied only upon what it deemed to be the clear language of N.J.S.A. 2A:62A-21 to abolish the Fireman's Rule in New Jersey. However, that determination is in direct conflict with the United States Supreme Court opinion in Fidelity Union Trust Co. v. Field, supra. In that case the Supreme Court reversed the Court of Appeals which had disregarded authoritative interpretations of statutes by the New Jersey state courts.

In the Fidelity Union Trust case, a decedent caused the title of a savings bank account in her name to be transferred on the records of the bank to herself in trust for the plaintiff. After the account holder died, the beneficiary brought suit against the bank and executors of the estate in the District Court. The District Court found that there was no trust and no valid gift. The Court of Appeals reversed, finding that statutes recently enacted by the New Jersey Legislature clearly and unambiguously required recognition of a valid transfer into trust of the bank account. In so doing, the Court of Appeals refused to follow two contrary decisions of the Chancery Court of New Jersey interpreting the same statutes.

Prior to the enactment of the statutes, it had been the law in New Jersey that a "mere savings bank deposit made by a decedent in his own name as trustee for another, of which the decedent exercised complete

control during his life, was insufficient to establish a gift inter vivos or to create a trust as against the decedent's legal representatives." Id. at 175.

The two New Jersey courts had determined that the statute in question failed to change the prior law. That statute provided as follows:

> FN1 Chapter 40, New Jersey Session Laws of 1932, Section 1, is as follows: Whenever any deposit shall be made with any savings bank, trust company or bank by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the savings bank, trust company or bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be made to the person in trust for whom the said deposit was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee...311 U.S. 169, 175.

The Court of Appeals felt that this language was absolutely clear on its face and that its enactment changed prior New Jersey law. The Court of Appeals held that the contrary decisions of the Chancery Court of New Jersey were not binding and it reversed the District Court.

The United States Supreme Court reversed the Court of Appeals. It is significant to note that the Supreme Court did not endeavor to analyze the New Jersey statute in question. Rather, the Court held the following:

> An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law its, should be followed by a federal court in deciding a state question. We have declared that principle in West v. American Telephone & Telegraph Co., 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139, decided this day. It is true that in that case an intermediate appellate court of the state had determined the immediate question as between the same parties in a prior suit, and the highest state court had refused to review the lower court's decision, but we set forth a broader principle as applicable to the decision of an intermediate court, in the absence of a decision by the highest court, whether the question is one of statute or common law.
>
> Here, the question was as to the construction and affect of a state statute. The federal court was not at liberty to undertake the determination of that question on its own reasoning independent of the construction and affect which the state itself accorded to its statute. That construction and affect are shown by the judicial action through which the State interprets and applies its legislation. That judicial action in this instance has been taken by the Chancery Court of New

> Jersey and we have no other evidence of the state law in this relation. Fidelity Union Trust, 311 U.S. 169, 177-178.

The appellate panel in Kelly v. Ely performed a careful analysis of the development of the Fireman's Rule in New Jersey and, after noting strong policy considerations, made the determination that the New Jersey Legislature had not intended to completely abolish the Fireman's Rule. The Court of Appeals in its opinion here felt that the language of the statute, N.J.S.A. 2A:62A-21, could not have permitted such a conclusion. However, the Supreme Court has indicated in Fidelity Union Trust Co. v. Field, supra, that the Court of Appeals was not free to make that determination of its own accord. The simple rule pronounced by the Fidelity Union Trust case is that where there is no basis, apart from the statute in question itself, on which the court may conclude that the state's highest court might reach a contrary result, the ruling of the state intermediate court must be left intact. See Hamme v. Dress and Crum Mfg. Co., 716 F.2d 152, 156 (3rd Cir. 1982). Also, see In re: Orso, 219 B.R. 402, 439 (Bankr. M.D. La., 1998); C.I.R. v. Bosch's Estate, 787 U.S. 456, 465 (1967); CPC Intern, Inc. v. Northbrook Excess and Surplus Insurance Co., 962 F.2d 77, 88 (1st Cir. 1992); Pentech Intern, Inc. v. Wall Street Clearing Co., 983 F.2d 441, 445 (2nd Cir. 1993); Claudio v. Scully, 982 F.2d 798, 811 (2nd Cir. 1992); Johnson v. Rosemeyer, 117 F.3d 104, 108 (3rd Cir. 1997).

II. The Court Should Not Have Considered Whether Kelly v. Ely Was In Conflict With N.J.S.A. 2A:62A-21 As This Issue Was Not Raised Before The United States District Court.

In the District Court, the plaintiff conceded that Kelly v. Ely was decided correctly. Plaintiff should not have been permitted to argue on appeal that it was not.

The Judge in the District Court, The Honorable Mary L. Cooper did not have before her and did not rule on the question on which the Court of Appeals based its decision.[1] The motion for summary judgment was argued on two occasions, September 4, 2001 and March 18, 2002. It was clear to all that plaintiff was not challenging the continued validity of the Fireman's Rule. N.J.S.A. 2A:62A-21 was never mentioned. Likewise, the briefs submitted to Judge Cooper by plaintiff's attorney did not call into question the efficacy of the Fireman's Rule. Plaintiff's only opposition to the motions of Vaspoli and Jones was that the Fireman's Rule did not exempt willful and wanton conduct. It was on the appeal to the Third Circuit that plaintiff first argued that Kelly v. Ely was wrongly decided and that the statute abolished the Fireman's Rule in its entirety. This deficiency was

[1] On page 13 of its opinion, the Third Circuit made reference to "the District Court's interpretation" of 2A:62A-21. Judge Cooper's decision made reference to the Appellate Division's interpretation of the statute in Kelly v. Ely so as not to enlarge the scope of property owner's liability. Judge Cooper's comments were made in the context of reciting the history of the Fireman's Rule. Her decision was nevertheless totally unrelated to the statute and Kelly v. Ely.

brought to the Court's attention in written submission and at oral argument. The opinion of the Third Circuit did not address this issue.

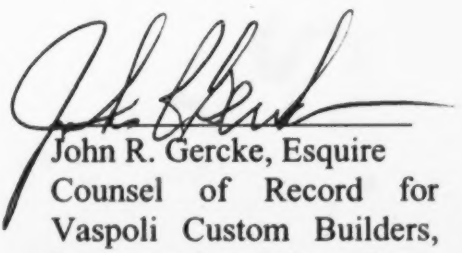
Ordinarily, the Court of Appeals does not pass upon matters which are not raised in the District Court. In the Matter of Linda Coal and Supply Company, 255 F.2d 653 (3rd Cir. 1958); Commercial National Bank of Philadelphia, PA v. Reber, 74 F.2d 301 (3rd Cir. 1934); Weinstein v. Laughlin, 21 F.2d 740 (8th Cir. 1927); City of Pittsburgh v. Jonathan Clark & Sons Co., 154 F. 464 (3rd Cir. 1907); Kleman v. Anheuser-Busch Brewing Ass'n, 237 F. 993 (3rd Cir. 1916); The Blakeley, 285 F. 348 (3rd Cir. 1923). The Court of Appeals in all of these cases made the same observation:

> In other words, the matter does not appear to have been raised before or considered by the trial court at all, and there is no exception or specific assignment of error covering it. While we are prompt to act upon our rule to notice a plain error not assigned, when such action is manifestly necessary to administer justice, we are not inclined in this instance to depart from the general rule that an appellate court will not review an alleged error of a trial court in a matter not directed to its attention and not passed upon, and with respect to which no objection has been made, no exception noticed, and no error assigned by the party complaining on appeal. Kleman v. Anheuser-Busch Brewing Ass'n, 237 F. 993, 998.

The issue here is not one of plain error concerning which the District Court actually made a ruling. The concept of plain error allows the Court of Appeals to correct only particularly egregious errors. US v. Thame, 846 F.2d 200 (3rd Cir. 1988); US v. Young, 470 U.S. 1 (1985); US v. Turcks, 41 F.3d 893 (3rd Cir. 1994); Government of Virgin Islands v. Smith, 949 F.3d 229 (3rd Cir. 2002). The plain error issue is seen frequently in criminal cases. However, in civil actions as well courts acknowledge the existence of plain error only sparingly. Plain errors are those that seriously affect the fairness, integrity or public reputation of judicial proceedings. Osei-Afriyie by Osei-Afriyie v. Medical College, 973 F.2d 876 (3rd Cir. 1991). Those criteria are not met in the matter sub judice.

CONCLUSION

The issue which controlled the decision of the Court of Appeals had not been raised in the District Court. Perhaps this explains why the Court and the parties did not address the controlling decisions of the United States Supreme Court which require the Court of Appeals to pay much greater deference to the New Jersey intermediate court of appeals decision in Kelly v. Ely. The existence of two conflicting points of law in the State of New Jersey, one in the state court, and one in the federal court, must be avoided. Accordingly, this Court should grant the Petition for Writ of Certiorari and affirm the decision of the United States District Court in favor of these defendants.



John R. Gercke, Esquire
Counsel of Record for
Vaspoli Custom Builders,
Inc. and J.A. Jones
Management Services, Inc.

PRECEDENTIAL

Filed September 16, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-3820

MARK ROMA, and his wife,
MELANIE ROMA

Appellants

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE NAVY; NAVAL FIREFIGHTER CAPTAIN; JOHN DOE; CONTRACTOR JOHN DOE; FIRE CHIEF JOHN DOE' BATTALION CHIEF JOHN DOE; JOHN DOE ENTITIES, (1-10), jointly, severally or in the alternative; J.A. JONES MANAGEMENT SERVICES, INC. t/a Jones Management Services; VASPOLI CUSTOM BUILDERS, INC. t/a Vaspoli Custom Builders; WIGAND AND SONS, previously identified as John Doe Contractor I, jointly, severally or in the alternative

v.

WILLIAM GREEN, d/b/a Green Carpentry; GREEN CARPENTRY, INC; HARLEYSVILLE INSURANCE COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
D.C. Civil No. 99-cv-05080
District Judge: The Honorable Mary Little Cooper

Argued: July 15, 2003

Before: McKEE, BARRY, and ROSENN, *Circuit Judges*

(Opinion Filed: September 16, 2003)

Ross Begelman, Esq. (Argued)
Begelman & Orlow
411 Route 70 East, Suite 245
Cherry Hill, NJ 08034

Attorney for Appellants

Stephen R. Dumser, Esq. (Argued)
Gercke, Dumser, Shoemaker & Sierzega
1236 Brace Road, Suite E
Cherry Hill, NJ 08034

Attorney for Appellee J.A. Jones Management Services, etc.

J. Andrew Ruymann, Esq. (Argued)
Assistant U.S. Attorney
Office of the United States Attorney
402 East State Street
Trenton, NJ 08608

Attorney for Appellee
United States of America

OPINION OF THE COURT

BARRY, *Circuit Judge:*

Appellant Mark Roma suffered smoke-inhalation injuries on November 24, 1997 while fighting a hangar fire at the United States Naval Air Engineering Station in Lakehurst, New Jersey ("NAES Lakehurst"). Roma's second amended complaint alleges thirteen counts of negligence against numerous defendants, including the United States, the Navy, several unidentified Navy firefighters, and other federal employees (collectively, "the federal defendants"), as well as the civilian contractors working on the hangar roof renovation project where the fire occurred. In essence, the complaint alleges two distinct tort claims at issue on appeal: (1) the federal defendants and the civilian contractors are liable for negligently starting the fire or failing to prevent it; and (2) the federal defendants are liable for Roma's injuries because they negligently instructed him to remove his

self-contained breathing apparatus ("SCBA") on the night of the fire.[1]

Roma now appeals from the District Court's September 5, 2002 order granting motions for summary judgment by the federal defendants and two of the civilian contractor defendants, J.A. Jones Management Services, Inc. ("J.A. Jones") and Vaspoli Custom Builders, Inc. ("Vaspoli"). We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.[2] For the reasons which follow, we will affirm that portion of the District Court's order granting summary judgment as to the federal defendants, but will reverse that portion of its order granting summary judgment as to J.A. Jones and Vaspoli.

---

[1]. The Complaint also asserted a loss of consortium claim on behalf of appellant Melanie Roma. Since the Romas did not address the District Court's dismissal of this claim in their brief, we do not address it in this opinion.

[2]. After Roma filed his notice of appeal, the Clerk's office, *sua sponte*, raised an issue of appellate jurisdiction regarding the timeliness of the notice of appeal. The notice of appeal was filed on October 2, 2002 -- after the District Court's September 5, 2002 Memorandum and Order granting summary judgment, but before the District Court entered a final order on October 9, 2002 dismissing all remaining counter-claims, third party claims, and cross-claims as moot and closing the case. "[A] premature notice of appeal filed after disposition of some claims before a district court, but before the entry of final judgment, will ripen upon the court's disposal of the remaining claims," absent any showing of prejudice to the appellee. *Lazy Oil Co. v. Witco Corp*, 166 F.3d 581, 585 (3d Cir. 1999) (citing *Cape May Greene, Inc. v. Warren*, 698 F.2d 179 (3d Cir. 1983)). As there is no prejudice alleged by appellees, we have jurisdiction over the appeal.

I.

Mark Roma joined the East Dover Township Volunteer Fire Department, located in East Dover, New Jersey, in 1991, and was an active member of the department until he left to join the Army in October 1995. Roma again became an active member of the department after he was honorably discharged from the Army in August of 1997. As an active member of the East Dover Fire Department, Roma took several firefighter training classes and participated in fighting hundreds of fires.

From September 22, 1983 through at least the date of Roma's alleged injury, the Board of Fire Commissioners for Dover Township, District No. 1, which included the East Dover Fire Department and the NAES Lakehurst Fire Department, were parties to a written mutual aid fire fighting assistance agreement, in which each party agreed to provide fire fighting assistance to the other party when requested, if the requested personnel and equipment were available. The agreement further provided that if assistance was rendered, "[t]he senior officer of the fire department of the requesting service shall assume full charge of the operations." The agreement also included a waiver provision, stating that "[t]he parties hereto waive all claims against every other party for compensation for any loss, damage, personal injury, or death occurring in consequence of the performance of this agreement."

On the afternoon of November 24, 1997, at approximately 2:00 p.m., a fire broke out on the roof of Hangar No. 1 at NAES Lakehurst. Hangar No. 1 was an enormous building -- approximately 960 feet long, 350 feet wide, and over 220 feet high -- which had once housed the Hindenberg and had been designated as a

national historic monument. After the NAES Fire Department arrived at the scene and realized the magnitude of the fire, mutual aid assistance was requested from fire departments in the surrounding communities. Nineteen fire companies comprising 140 mutual aid personnel responded to NAES Lakehurst's call, including the East Dover Fire Department.

The hangar fire was burning between the two roofs of Hangar No. 1, where Vaspoli had been doing renovation work to enlarge the roof's drainage gutters. The firefighters worked to contain the fire both from the inside and from on top of the roof. In order to manage the many mutual aid firefighters fighting such a large fire on the roof of such an enormous building, the NAES Lakehurst Fire Department put an Incident Command System in place with Acting Assistant Chief of the NAES Fire Department, Joseph Catapano, serving as the overall commander and other NAES Fire Department supervisors directing the firefighting activities in particular areas.

According to Roma, he and six other volunteer firefighters from the East Dover Fire Department, led by a Lieutenant Cheblowski, responded to NAES Lakehurst's call for assistance. Soon after their arrival, an NAES Lakehurst firefighter instructed Lieutenant Cheblowski to send three firefighters to the hangar, and Cheblowski sent Roma and firefighters Jay Melby and Dave Carus. As they approached the hangar, an NAES Lakehurst firefighter instructed them to cover some flight simulators in the hangar with tarps. Once they covered the flight simulators, they were sent back to their truck.

Roma testified that as he, Melby, and Carus passed the main command vehicle on their way back to the truck, they were told by either the NAES Lakehurst Chief or Assistant Chief to retrieve their SCBAs and tools and report back to the hangar because additional assistance was required on the roof. When they got to the East Dover truck, they explained to Lieutenant Cheblowski what they had been told to do, and Cheblowski instructed them to follow those instructions. The three then reported to the base of the hangar elevator shaft transporting firefighters and equipment to the roof.

When Roma arrived at the roof with Melby and Carus, an NAES Lakehurst firefighter instructed them to drop their SCBAs, get into harnesses, and go out onto the roof. When Roma questioned the order to remove his SCBA, he was told by the NAES firefighter that it was not needed on the roof, and was not allowed. Roma followed the order and left his SCBA in a pile of 20 or 30 SCBAs lying at the top of the elevator. None of the many firefighters making their way onto the roof from the top of the elevator was wearing an SCBA. Roma then followed another order (apparently from the same NAES firefighter at the top of the elevator) to deliver some saws to other firefighters working on the roof. After he made his way out onto the roof, Roma delivered the saws to a group of 20 to 30 firefighters. None of those firefighters was wearing an SCBA.

After delivering the saws, Roma was told to help out on the roof wherever needed, and began passing additional tools to the firefighters working on the roof trench. Then, according to Roma, two NAES firefighters in white hats directed him to relieve a firefighter who was sitting in a

square hole in the roof, spraying water from a fire hose down into the hole onto the wooden subroof below. The wooden subroof was not simply exposed wood, but was coated with a rubber roofing material, similar to shingles, and had been the top roof before the metal roof was added.

Roma followed these instructions, took his place in the hole, and began spraying water onto the wooden subroof. According to him, when he began spraying, the wood was not on fire and he did not notice any smoke coming from the hole. Just before he was relieved, however, Roma testified that "some steam, it seemed like, it wasn't even smoke, it was steam, like a mist, started coming back at me as they were cutting trenches further down." Although Roma stated that the steam or mist disappeared after a couple of minutes, he inhaled some of it first.

Roma was relieved by other firefighters shortly thereafter and made his way to the elevator. On his way back across the roof, he observed white steam or misty smoke rising from holes in the roof. Roma testified that there were then approximately 60 firefighters working on the roof, and he did not see a single one wearing an SCBA. When he arrived at the elevator, Roma retrieved his SCBA, took the elevator back to the ground floor, and had a sandwich and some juice with other firefighters in the rehabilitation area.

Roma then returned to the East Dover fire truck, which was soon released by the incident commander. On the way back to the East Dover fire station, he began to cough up blood. Once back at the station, a first aid

squad was called, and he was transported to the hospital, where he remained for a day or two.

The fire on the roof of Hangar No. 1 started in the course of drainage renovation work being done on the roof by Steven Vaspoli, Bill Green, and Lane Friesen, employees of Vaspoli, who in turn had been subcontracted the work by J.A. Jones. As the general contractor and the only party with a direct contract with the government, J.A. Jones was responsible for quality control, and supervised and directed Vaspoli to ensure that it performed the work in accordance with the government's contractual requirements. For example, J.A. Jones provided Vaspoli with a Safety and Health Plan which identified hazards of the project and required certain safety controls. A J.A. Jones employee also visited the job site daily to inspect progress on the project and ensure it was being completed in accordance with contractual requirements.

In addition to frequent inspections by J.A. Jones, Vaspoli was required to obtain a Hot Work Permit from an NAES Lakehurst Fire Department inspector when necessary on any given day. According to Buck Shimp, the fire inspector who issued the vast majority of the permits to Vaspoli, a Hot Work Permit was required any time spark-producing equipment or an acetylene torch was used on the roof project. According to Mr. Vaspoli, however, a Hot Work Permit was only required on days his crew was using an acetylene torch. In any event, an NAES fire inspector issued a Hot Work Permit to Vaspoli on nearly every day that it was working on Hangar No. 1, including the day of the fire. For fire prevention purposes, and to satisfy Hot Work Permit requirements,

Vaspoli kept two fire extinguishers and several buckets of water on the roof of the hangar on every work day, and had an employee keep fire watch on the ground on those days that its crew was using the torch.

The roof drainage improvements involved cutting into the existing metal roof to make space for a larger gutter, and then covering the new plywood gutter with rubber roofing material. In order to cut through the metal roof, Vaspoli used a gas-powered demolition saw (also called a "chop saw") which gave off sparks as it cut into the metal roof. J.A. Jones's inspector, the government project inspector, and the NAES Lakehurst fire inspector were all aware that the chop saw gave off sparks when it came into contact with the roof. At no time did any of these individuals advise Mr. Vaspoli to use a different kind of saw due to a risk of fire.

After Mr. Vaspoli and his co-workers had completed one third of the gutter work on the west side of the roof, they discovered, in the ten to twelve-inch space between the metal roof and the wooden subroof, boxes and packing material that had been left behind several years earlier by the contractor who had originally installed the metal roof over the wooden subroof. Vaspoli removed the trash, which filled approximately 15 industrial garbage bags, and informed J.A. Jones, in daily notes, and the naval project inspector, that trash had been found and requested instructions about what to do with it.

Vaspoli only found and removed trash on that one day while working on the west side of the roof, and did not encounter any more trash until it began work on the east side of the roof. Mr. Vaspoli explained that it was

impossible to know whether there was trash under a particular portion of the roof until that portion was actually cut and removed. At no time did Mr. Vaspoli contemplate that the trash might present an increased risk of fire. Neither did Keith McDonough, the government quality control inspector, who visited Vaspoli's work site every day of the project, even conceive of the possibility that the trash presented an increased risk of fire.

The day of the fire, November 24, 1997, the Vaspoli crew started in the morning with a "burn," using an acetylene torch to cut a steel roof beam. After lunch, they began cutting the next 30 feet of the roof to prepare it for the roofing contractor. At around 1:30 p.m., as they began to lift the roof panels that had just been cut by the chop saw, they noticed smoke coming from below where the roof had been cut but the metal panels not yet removed. When they removed the panels from that area, they observed a small fire on top of the wooden subroof. They lifted another panel and smoke poured over them. They then emptied the two fire extinguishers and poured the buckets of water on the fire, but the smoke did not subside. They pulled the fire alarm, radioed their man on the ground to tell him there was a fire, and evacuated the roof.

On January 22, 1998, Roma submitted to the Navy the administrative claim form required to make a claim under the Federal Tort Claims Act, Standard Form 95 (SF-95), seeking damages for the injuries he suffered fighting the November 27, 1997 fire. In that SF-95, Roma described the basis for his claim as follows: "During fire emergency claimant was ordered to remove breathing respirator. As a result of same, claimant sustained

significant damage to his respitory [sic] system, (note - claimant was a volunteer firemand [sic] for Dover Township Fire Department." In the space for the amount of the claim on the SF-95, Roma filled in the word "unknown."

In a letter dated March 23, 1998, a representative of the Navy Legal Service Office Mid-Atlantic advised Roma's counsel that the administrative claim was invalidly presented because it failed to include a specified damages amount, adequate information to allow for an investigation, or medical records or bills documenting Roma's injuries. On April 14, 1998, the Navy received Roma's second or amended SF-95, which included a specified damages amount of $1,000,000, and restated essentially the same basis for the claim -- that is, that Roma "was instructed to remove his breathing apparatis [sic] and was injured as a result of same while trying to 'fight' the fire...."

In a letter dated July 22, 1999, the Navy denied Roma's administrative claim. The letter stated that "[a] thorough examination of the facts of this claim indicates the United States is not liable under the Federal Tort Claims Act. There is no evidence of negligence on the part of the United States or a Government employee."

II.

Roma challenges the District Court's grant of summary judgment on three grounds: First, he argues that the District Court improperly concluded that the New Jersey "fireman's rule" barred his claims against the contractors and the federal defendants based on their negligence in

starting the fire or failing to prevent it. Second, he contends that the District Court erred in dismissing his FTCA claim against the United States for its negligence in preventing the fire because he failed to allege this claim in his amended administrative claim form. Third, he argues that the District Court erred in finding that the undisputed facts showed that he was a "special employee" of the NAES Fire Department on the night of the fire, precluding his claim for damages against the United States under New Jersey's statutory workmen's compensation scheme, N.J. Stat. Ann. § 34:15-1, *et seq.*

We exercise plenary review over the District Court's grant of summary judgment, and accordingly apply the same standard as the District Court. *Wastak v. Lehigh Valley Health Network,* 333 F.3d 120, 124 (3d Cir. 2003). That is, summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "A factual dispute is material if it bears on an essential element of the plaintiff's claim, and is genuine if a reasonable jury could find in favor of the nonmoving party." *Natale v. Camden County Corr. Facility*, 318 F.3d 575, 580 (3d Cir. 2003).

A.

We begin by addressing Roma's argument that the District Court incorrectly concluded that his claims against the federal defendants, Vaspoli, and J.A. Jones for their negligence in starting or failing to prevent the fire were barred by the New Jersey fireman's rule. According

to the fireman's rule, "the owner or occupier [of a premises] is not liable to a paid fireman for negligence with respect to creation of a fire." *Krauth v. Geller*, 157 A.2d 129, 130 (N.J. 1960). In holding that the fireman's rule applied to Roma's claims, the District Court relied upon *Kelly v. Ely*, 764 A.2d 1031, 1034-35 (N.J. Super. Ct. App. Div. 2001), *certification denied*, 772 A.2d 937 (N.J. 2001), in which the Appellate Division of the Superior Court of New Jersey held that N.J. Stat. Ann. § 2A:62A-21, passed by the New Jersey Legislature in 1994, did not abolish the common law fireman's rule, but only partially abrogated it.

We agree with Roma that *Kelly's* holding is inconsistent with the plain language of section 2A:62A-21, which certainly appears to have abolished the fireman's rule in its entirety and, therefore, cannot be used as an accurate predictor of how the Supreme Court of New Jersey would interpret the statute. In order to properly explain this conclusion, it is first necessary to provide some limited background on the origin of the New Jersey fireman's rule and its subsequent permutations.

The fireman's rule was first applied as a common law principle by the Supreme Court of New Jersey in 1960. *Krauth*, 157 A.2d at 130. The Court recognized that application of the rule was, in essence, a "policy decision [] that it would be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained with public funds to deal with those inevitable. . . occurrences." *Id.* at 131. The Court also noted an analogous non-economic justification, reasoning that firefighters, in choosing their

profession, willingly accept the risks engendered by others' negligence in starting fires, and thus "cannot complain of negligence in the very occasion for [their] engagement." *Id.*

Whatever its policy justifications, New Jersey courts substantially broadened the rule over the next thirty years. In 1979, the rule was applied to volunteer firefighters, *Ferraro v. Demetrakis*, 400 A.2d 1227, 1229 (N.J. Super. Ct. App. Div. 1979), and in 1983 to the negligence claims of police officers. *Berko v. Freda*, 459 A.2d 663, 666 (N.J. 1983). Then, in 1991, the Supreme Court of New Jersey further broadened the fireman's rule, holding that, in addition to barring liability for negligent acts which caused the fire or emergency, the rule also barred liability where the injuries arose from other negligent acts by third parties, unrelated to the fire or emergency, that firefighters and police officers in the normal course of their duties should expect to meet. *Rosa v. Dunkin' Donuts of Passaic*, 583 A.2d 1129, 1133 (N.J. 1991) ("To hold otherwise creates artificial distinctions between the negligence that occasioned one's presence and the negligence defining the scene at which one arrives....").

In 1994, the New Jersey Legislature intervened, passing N.J. Stat. Ann. § 2A:62A-21, which provides, in pertinent part:

> In addition to any other right of action or recovery otherwise available under law, whenever any law enforcement officer, firefighter, or member of a duly incorporated first aid, emergency, ambulance, or rescue squad association suffers any injury, disease or death

> while in the lawful discharge of his official duties and that injury, disease or death is directly or indirectly the result of the neglect, willful omission, or willful or culpable conduct of any person or entity, other than that law enforcement officer, firefighter, or first aid, emergency or rescue squad member's employer or co-employee, the law enforcement officer, firefighter, or first aid, emergency, ambulance or rescue squad member suffering that injury or disease...may seek recovery and damages from the person or entity whose neglect, willful omission, or willful or culpable conduct resulted in that injury, disease or death.

The plain and extremely broad language of the statute appears to have abolished the fireman's rule by allowing a firefighter recovery for any injury that *"directly or indirectly"* is the "result of the *neglect*...of *any* person or entity."(emphasis added). Indeed, the only Supreme Court of New Jersey case to even mention the fireman's rule after the statute was passed noted in dicta that "[b]ecause the Legislature has, in effect, abolished the firefighters' rule in New Jersey, this case will probably be the last in which this Court will consider an application of the rule." *Boyer v. Anchor Disposal*, 638 A.2d 135, 136 (N.J. 1994) (citation omitted).[3] Since *Boyer*, at least two other courts have also suggested in dicta that section

---

[3]. The Supreme Court in *Boyer* did not need to address the continuing viability of the New Jersey fireman's rule because the case concerned an accident that occurred before the statute was passed, and because the Court also found that, in any event, the pre-statute rule did not bar the claim at issue. *Boyer*, 638 A.2d at 139.

2A:62A-21 abolished the fireman's rule in New Jersey. *See James v. Arms Tech., Inc.*, 820 A.2d 27, 48 (N.J. Super. Ct. App. Div. 2003); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245, 260 n.10 (D.N.J. 2000).

Despite acknowledging the *Boyer* dicta, the Appellate Division, in the only New Jersey case to have considered the continuing viability of the fireman's rule after N.J. Stat. Ann. § 2A:62A-21 was passed, held in *Kelly* that the statute *did not* abolish the rule. In *Kelly*, the plaintiff firefighter sought damages for injuries he sustained when he tripped on a curb when responding to a fire allegedly caused by the defendant's negligence. The Appellate Division held that the New Jersey Legislature did not intend to do away with the fireman's rule in its entirety by passing section 2A:62A-21, but only intended to restore the rule to its pre-*Rosa* state -- that is, to "afford protection to a firefighter injured as a result of the negligence unrelated to and independent of, the onset of the fire. It was not intended to make a homeowner responsible for a firefighter's injuries when the only negligence present related to the start of the fire itself." *Kelly*, 764 A.2d at 1034-35.

Careful review of the opinion in *Kelly* leaves little if any doubt that the Appellate Division based its interpretation of section 2A:62A-21 neither on the language of the statute nor upon relevant legislative history (which, as the Appellate Division recognized, does not exist), but instead explicitly based its interpretation solely on public policy considerations. *Id.* The Appellate Division reasoned that if the statute indeed abolished the fireman's rule, giving injured firefighters a

cause of action against individuals who negligently started a fire, "the scope of potential liability would be virtually unlimited." *Id.* at 1034. Thus, it concluded, it was "highly unlikely that the Legislature would have intended to enlarge the scope of a property owner's liability" as well as providing a harmful incentive for property owners to "delay summoning aid out of fear of incurring liability to a responding firefighter." *Id.*

Because the Supreme Court of New Jersey has never interpreted section 2A:62A-21 (and the passing dictum in *Boyer* was not interpretation), our task, in reviewing the District Court's interpretation of that statute, is to predict how the Supreme Court would rule on this question of New Jersey law. *U.S. Underwriters Ins. Co. v. Liberty Mut. Ins. Co.*, 80 F.3d 90, 93 (3d Cir. 1996). Ordinarily, in so predicting, "[t]he rulings of intermediate [state] appellate courts must be accorded significant weight." *Id.* We are not bound by the interpretations of intermediate state appellate tribunals, however, if other sources present "a persuasive indication that the highest state court would rule otherwise." *Id.*

Our review of the plain and extremely broad language of section 2A:62A-21 leads inexorably to the conclusion that the New Jersey Legislature has abolished the fireman's rule. The statute explicitly gives a firefighter a right of action against any party who "directly or indirectly" caused his or her injury through simple "neglect," and there is no language which even hints that this was not what the Legislative intended to do.[4] Despite

---

[4]. The only exception, inapplicable here, is if the injury is caused by the firefighter's employer or co-employee.

the arguable merit of the public policy concerns it expressed in *Kelly*, the Appellate Division did not even attempt to base its holding on the language of the statute.

Accordingly, we find that the plain language of section 2A:62A-21 constitutes, in and of itself, a "persuasive indication" that the Supreme Court of New Jersey would not follow *Kelly*, but would instead conclude that the fireman's rule no longer precludes tort claims by a firefighter against persons who negligently started the fire that injured him or her. Thus, Roma's negligence claims against Vaspoli and J.A. Jones are not barred by the fireman's rule, and the District Court's grant of summary judgment in their favor will be reversed.[5]

---

[5]. In light of our holding that the New Jersey fireman's rule does not preclude Roma's negligence claims against Vaspoli and J.A. Jones, we need not address Roma's contention that the District Court erred in concluding that there was insufficient evidence to create a triable issue of act as to whether Vaspoli's or J.A. Jones's conduct was egregious as to fall under the common law exception to the fireman's rule for "willful and wanton conduct." *See Mahoney v. Carus Chem. Co., Inc.*, 510 A.2d 4, 12 (N.J. 1986). Our review of the record, however, has yielded no evidence that suggests that either Vaspoli's or J.A. Jones's conduct was "willful and wanton" under New Jersey law. *See McLaughlin v. Rova Farms, Inc.*, 266 A.2d 284, 293 (N.J. 1970) (for conduct to be willful and wanton, "it must appear that the defendant with knowledge of existing conditions, and conscious from such knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result").

B.

While we will reverse the District Court's grant of summary judgment to Vaspoli and J.A. Jones on Roma's negligence claims, we will affirm the District Court's grant of summary judgment to the federal defendants. The FTCA expressly provides, in 28 U.S.C. § 2401(b), that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues...." Similarly, 28 U.S.C. § 2675(a) provides that "[a]n action shall not be instituted upon a claim against the United States" for damages caused by "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing...." In light of the clear, mandatory language of the statute, and our strict construction of the limited waiver of sovereign immunity by the United States, we have held that the requirement that the appropriate federal agency act on a claim before suit can be brought is jurisdictional and cannot be waived. *Livera v. First Nat'l State Bank of New Jersey*, 879 F.2d 1186, 1194 (3d Cir. 1989).

"Although an administrative claim need not propound every possible theory of liability in order to satisfy section 2675(a),...a plaintiff cannot present one claim to the agency and then maintain suit on the basis of a different set of facts." *Deloria v. Veterans Admin.*, 927 F.2d 1009, 1011-12 (7th Cir. 1991) (citations and internal quotations omitted). In other words, notice in the form of

an administrative claim "satisfies section 2675's requirement...if the claimant (1) gives the agency written notice of his or her claim sufficient to enable the agency to investigate and (2) places a value on his or her claim." *Tucker v. United States Postal Serv.*, 676 F.2d 954, 959 (3d Cir. 1982).

Roma does not dispute that the amended administrative claim he filed with the Navy on April 14, 1998 set forth as the only basis for his claim that the NAES Lakehurst firefighter's negligent instruction that he remove his SCBA caused his injuries. Neither his initial nor his amended administrative claim alleged that the United States or its employees caused his injuries by negligently failing to prevent the fire. Roma argues, however, that his allegation in the initial administrative claim that his injuries were caused by the Hangar No. 1 fire gave the Navy sufficient notice that it also had to investigate potential negligence on the part of federal employees in failing to prevent the fire and, therefore, satisfied 28 U.S.C. § 2675(a)'s administrative exhaustion requirement.

We disagree. The facts concerning how the fire started and any negligence by federal employees in failing to prevent it are entirely distinct from the conduct involved in supervising the firefighting operations, including the NAES Lakehurst firefighter's instruction to Roma to remove his SCBA. In other words, the allegation that an NAES Lakehurst firefighter negligently caused Roma's injuries by ordering him to remove his SCBA did not provide any notice to the United States that it not only had to investigate the way the firefighting was handled by federal employees, but that it also had to engage in a

much broader investigation concerning whether the negligence of other, non-firefighter, federal employees may have contributed to the start of the fire itself. Accordingly, while we reverse the District Court's grant of summary judgment in favor of Vaspoli and J.A. Jones for their alleged negligence in starting or failing to prevent the fire, we will affirm the District Court's dismissal of the analogous claim against the federal defendants for lack of jurisdiction.

C.

Finally, Roma contends that the District Court erred in holding that his remaining, properly exhausted claims against the federal defendants were precluded by New Jersey's workman's compensation scheme because, under New Jersey law, he was a "special employee" of the NAES Fire Department on the night of the hangar fire. Specifically, Roma argues that his limited role in fighting the hangar fire did not satisfy the test for being a special employee because the federal defendants did not pay his wages and did not have power to hire or fire him. Neither of these elements, however, is part of the three-part special employee test promulgated by the Supreme Court of New Jersey in *Volb v. G.E. Capital Corp.*, 651 A.2d 1002, 1004-05 (N.J. 1995). Accordingly, we will affirm the District Court's grant of summary judgment in favor of the federal defendants on the remaining claims against them.

Under New Jersey's workmen's compensation scheme, N.J. Stat. Ann. § 34:15-1, *et seq.*, "an employee's exclusive remedy against [his] employer for ordinary work injuries is a statutory remedy without regard to

fault. In return, the employee forgoes a common law tort remedy." *Gore v. Hepworth*, 720 A.2d 350, 353 (N.J. Super. Ct. App. Div. 1998); *see* N.J. Stat. Ann. § 34:15-8 (acceptance of workmen's compensation "shall be a surrender by the [employee]...of [his] rights to any other method, form, or amount of compensation"). In addition to barring tort claims against an employer for employment injuries, New Jersey law also bars tort claims against a plaintiff's co-employee for allegedly negligent actions in the course of his employment. N.J. Stat. Ann. § 34:15-8.[6] The workmen's compensation statute also expressly provides that its benefits and limitations apply to volunteer firefighters, and provides the same measure of protection to volunteer firefighters as it does to paid firefighters. N.J. Stat. Ann. § 34:15-43; *Ohrel v. Continental Cas. Co.*, 350 A.2d 310, 318 (N.J. Super. Ct. Law Div. 1975).

It is well settled under New Jersey law that an employee may have two employers for purposes of the workmen's compensation scheme -- a primary employer and a "special" employer -- and is barred from bringing a tort lawsuit against either employer. *Volb*, 651 A.2d at 1006; *Gore*, 720 A.2d at 353. Obviously, because Roma was not directly employed by the NAES Fire Department, his properly exhausted negligence claims against the federal defendants for their alleged negligence in supervising him on the night of the fire and instructing

---

[6]. N.J. Stat. Ann. § 34:15-8 provides, in part: "If an injury or death is compensable under this article, a person shall not be liable to anyone at common law or otherwise on account of such injury or death for any act or omission occurring while such person was in the same employ as the person injured or killed, except for intentional wrong."

him to remove his SCBA are only barred by the workmen's compensation statute if the NAES Fire Department may be considered his "special employer" under New Jersey law.

In *Volb*, the Supreme Court of New Jersey established a three-prong test for determining whether a defendant should be considered a "special employer" for workers' compensation purposes. 651 A.2d at 1004-05. Under the test, an employee is a special employee of the borrowing employer if: "[a] The employee has made a contract of hire, express or implied, with the special employer; (b) The work being done is essentially that of the special employer; and (c) The special employer has the right to control the details of the work." *Id.* at 1005. Although some New Jersey lower courts have considered two additional elements -- "(d) the special employer pays the employees wages; and (e) the special employer has the power to hire, discharge or recall the employee," *Kelly v. Geriatric & Med. Servs., Inc.*, 671 A.2d 631, 633 (N.J. Super. Ct. App. Div.), *aff'd*, 685 A.2d 943 (N.J. 1996) -- other cases have minimized the importance of these two additional factors. *See, e.g., Santos v. Standard Havens, Inc.*, 541 A.2d 708, 712 (N.J. Super. Ct. App. Div. 1988) (whether special employer paid employee's wages is not determinative of employment relationship).

The Supreme Court of New Jersey has emphasized, however, and most other New Jersey cases considering the issue have reiterated, that "the most important factor in determining a special employee's status is whether the borrowing employer had the right to control the special employee's work." *Volb*, 651 A.2d at 1005. There can be little doubt that the District Court correctly concluded

that Roma's work fighting the November 24, 1997 fire for the NAES Fire Department rendered him a paradigmatic example of a special employee under *Volb*'s three-part test.

As to the first *Volb* prong -- whether Roma had an express or implied contract with NAES -- an employee has an implied contract with a special employer if "the employee consents to the special employment relationship...[and] voluntarily submit[s] to the employer's direction and control." *Antheunisse v. Tiffany & Co., Inc.*, 551 A.2d 1006, 1008 (N.J. Super. Ct. App. Div. 1988) (citations omitted). In his deposition testimony, Roma conceded that he consented to the special employment relationship on the night of the hangar fire, and that he voluntarily submitted to the direction of the NAES Fire Department officers and personnel who were directing the firefighting operation.

Moving to the second prong, it is readily apparent that the work performed by Roma -- fighting the Hangar No. 1 fire -- was "essentially the work of" the NAES Fire Department. New Jersey courts have articulated the relevant question as to whether the work done by the plaintiff "was an integral part of the regular business" of the borrowing employer, *Rossnagle v. Capra*, 318 A.2d 25, 30 (N.J. Super. App. Div. 1973), or whether "there is a functional integration of [the] respective operations" of the lending and borrowing employers. *Santos*, 541 A.2d at 711. Under either articulation of the test, rendering assistance in fighting a fire at NAES Lakehurst under a mutual aid agreement which required each fire department to help the other upon request renders the

work of one fire department "essentially the work of" the other.

Finally, as to the all-important third prong -- whether the NAES Fire Department had the right to control Roma as he was combating the hangar fire -- there is little or no dispute that the NAES Lakehurst Fire Department had the authority to and did control Roma's activities. First, the mutual aid agreement expressly provided that "the senior officer of the fire department of the requesting service shall assume full charge of the operations." Second, when the East Dover Fire Department responded to NAES Lakehurst's call for assistance on November 24, 1997, Roma's commander, Lieutenant Cheblowski, expressly instructed him to follow the instructions of the NAES firefighters directing the fire control effort. Finally, Roma himself testified that at all times he followed the orders of NAES Fire Department officers and other personnel, and that following such orders caused his injuries.

Accordingly, we will affirm the District Court's grant of summary judgment in favor of the federal defendants dismissing Roma's claims based on the NAES firefighter's instruction that he remove his SCBA before proceeding onto the hangar roof -- the only claim against the federal defendants as to which Roma properly exhausted his administrative remedies.

III. CONCLUSION

For the foregoing reasons, we will reverse that portion of the District Court's September 25, 2002 order granting Vaspoli Custom Builders, Inc.'s and J.A. Jones Management Services, Inc.'s motions for summary judgment and remand for further proceedings consistent with this opinion. We will, however, affirm that portion of the District Court's order granting the federal defendants' motion for summary judgment.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-3820

MARK ROMA, and his wife, MELANIE ROMA,
Appellants

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE NAVY; NAVAL FIREFIGHTER CAPTAIN; JOHN DOE; CONTRACTOR JOHN DOE; FIRE CHIEF JOHN DOE; BATTALION CHIEF JOHN DOE; JOHN DOE ENTITIES, (1-10), jointly, severally or in the alternative; J.A. JONES MANAGEMENT SERVICES, INC. t/a Jones Management Services; VASPOLI CUSTOM BUILDERS, INC. t/a Vaspoli Custom Builders; WIGAND AND SONS, previously identified as John Doe Contractor I, jointly, severally or in the alternative

v.

WILLIAM GREEN, d/b/a Green Carpentry; GREEN CARPENTRY, INC.; HARLEYSVILLE INSURANCE COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
D.C. Civil No. 99-cv-05080
District Judge: The Honorable Mary Little Cooper

Present: MCKEE, BARRY, and ROSENN, Circuit Judges

SUR PETITION FOR PANEL REHEARING

The petition for rehearing filed by Defendants/Appellees Vaspoli Custom Builders and J.A. Jones Management Services, Inc. having been submitted to the judges who participated in the decision of this Court, and no judge who concurred in this decision having asked for rehearing, the petition for rehearing is DENIED.

BY THE COURT:

/s/ **Maryanne Trump Barry**
Circuit Judge

DATED: February 25, 2004
CLC\cc: Ross Begelman, Esq.
Stephen R. Dumser, Esq.
J. Andrew Ruymann, Esq.

Supr
F
(2)

04 114 MAY 21 2004

No.

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

J.A. JONES MANAGEMENT SERVICES, INC. T/A JONES MANAGEMENT SERVICES, INC. AND VASPOLI CUSTOM BUILDERS, INC. T/A VASPOLI CUSTOM BUILDERS,

Petitioners

v.

MARK ROMA, AND HIS WIFE, MELANIE ROMA

Respondents

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN R. GERCKE, ESQUIRE
COUNSEL OF RECORD
GERCKE, DUMSER & SIERZEGA
1236 BRACE ROAD, SUITE E
CHERRY HILL, NJ 08034
(856) 795-5800

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARK ROMA, et al.,	:	
	:	CIVIL ACTION NO. 99-
Plaintiffs,	:	5080(MLC)
	:	
v.	:	**MEMORANDUM & ORDER AND ORDER**
	:	
UNITED STATES OF AMERICA, et al.,	:	**TO SHOW CAUSE**
	:	
Defendants.	:	
	:	

COOPER, District Judge

This matter comes before the court on three motions for summary judgment by various defendants ("Moving Defendants") as to the claims of plaintiffs Mark Roma ("Mark Roma") and his wife Melanie Roma ("Melanie Roma") (collectively "Plaintiffs"). The first motion is made by defendants United States of America ("United States"), United States Department of the Navy

("Department of the Navy"), and Naval Firefighter Captain John Doe ("Naval Firefighter Captain John Doe") (collectively "Federal Defendants"). Federal Defendants seek summary judgment on the grounds of: (1) lack of subject matter jurisdiction over Melanie Roma's loss of consortium claim and Mark Roma's claim of negligence in starting or failing to prevent the fire, due to failure to exhaust administrative remedies under the Federal Tort Claims Act; (2) application of the New Jersey "Fireman's Rule;" and (3) the exclusive nature of Mark Roma's remedy under New Jersey's workers' compensation law. The second motion and third motion, by defendants Vaspoli Custom Builders, Inc. t/a Vaspoli Custom Builders ("Vaspoli") and J.A. Jones Management Services t/a Jones Management Services ("Jones"), are based on the statutory immunity created by the Fireman's Rule. This Court will grant these motions in their entirety

and all claims asserted by Mark Roma and Melanie Roma against Moving Defendants, as well as any John Doe defendants who were federal employees, will be dismissed with prejudice. Furthermore, this Court will order the parties to show cause why any remaining claims in the first-party action, claims in the third-party actions, and cross claims should not be dismissed in their entirety as moot, thereby closing this case.

BACKGROUND

On or about November 24, 1997, Mark Roma, a volunteer firefighter for the East Dover Volunteer Fire Department, was allegedly injured by smoke inhalation suffered while fighting a fire at the Lakehurst Naval Air Engineering Station ("NAES"). (Am. Compl. II ¶¶ 1-11.)

Pursuant to a Mutual Aid Agreement, the NAES summoned the East Dover Volunteer Fire Department,[1] located outside of the NAES district, to assist in quelling a fire that had broken out on the roof of Hangar No. 1.[2] (Strasser Decl. at ¶ 8.)

Hangar No. 1 was undergoing improvements to its roof drainage system at the time of the fire. (Decl. of J. Andrew Ruymann dated 2-22-02 ("Ruymann Decl.") Ex. 5: Dep. of Steven J. Vaspoli dated 6-22-01 (Vaspoli Dep.") at 84.) The drainage work was part of a larger contract assigned to Jones as general contractor for the project. (Fed. Defs.' Material Facts ¶26.) Jones subcontracted the work on the roof to Vaspoli. (See

[1]. Approximately 19 fire companies responded to the call for mutual aid. (Federal Defts.' Statement of Material Facts in Supp. of Mot. for Summ. J. ("Fed. Defs.' Material Facts") ¶ 7; Decl. of Richard Strasser dated 2-22-02 ("Strasser Decl.") ¶ 10.)

[2]. Hangar No. 1 is a national historic monument that once housed the *Hindenburg*. (Strasser Decl. ¶ 7.)

generally. Ruymann Decl. Ex. V-9: Contract between Jones and Vaspoli dated 6-22-01.) The fire began when Vaspoli was removing the hangar's metal roof with a spark-producing "chop saw." (Vaspoli Dep. at 84.) The hangar had two roofs, namely the metal roof undergoing the drainage updates and a wooden sub-roof below it. Vaspoli, in the course of the drainage work, discovered debris between these two roofs consisting of industrial garbage bags, filled with cardboard, paper, and miscellaneous construction scraps. (Id. at 50.) It was determined before the outbreak of the fire that this debris had been left behind by a contractor who had worked on the roofs approximately ten years earlier.[3] (Id.) Vaspoli, who had been working on the roof for approximately

[3] Boxes of debris were marked with the name of defendant Wigand and Sons. Wigand and Sons cannot be located, has not been served, and is presumed to no longer be in existence. (Pls. Br. in Opp'n. to Fed. Defts.' Mot. ("Pls.' Br.") at 22.)

eight weeks before the fire, reported that the debris was spread intermittently throughout the roof of the hangar, making it hard to predict whether there was any debris under the daily worksite.[4] (Id. at 136-40.) The sparks from the chop saw ignited some of the debris, resulting in a fire between the roof and the sub-roof. (Id.)

The East Dover Volunteer Fire Department responded to the call for mutual aid by dispatching a fire truck and approximately seven firefighters, including Mark Roma. (Ruymann Decl. Ex. 1: Dep. of Mark Roma dated 9-14-01 ("Roma Dep.") at 75.) The East Dover Volunteer Fire Department set up post at NAES Station 63, where the highest-ranking officer on the truck, Lieutenant Chris Chlebowski ("Chlebowski"), received instructions from

---

[4]. Hangar No. 1 is one of the largest structures on the base, measuring approximately 960 ft. long, 350 ft. wide, and over 220 ft. high. (Strasser Decl. ¶ 7.)

NAES officers as to where the East Dover firefighters would be most needed. (Id. at 76.) Chlebowski told three of his men, including Mark Roma, to report to the NAES Captain, and render assistance. (Id. at 77.) The NAES Captain directed the men to assist in covering flight simulators with tarps. (Id. at 78.) The East Dover firefighters, after completing this task, were ordered back to their truck. Unidentified NAES officers stopped these firefighters, and they asked the East Dover firefighters to go to their truck and gather equipment, including saws and SCBA units,[5] and then report to the hangar roof. (Id. at 81, 83.) The East Dover firefighters went to their truck and informed Chlebowski of the request for assistance on the roof of the hangar. (Id. at 82.) Chlebowski told them to report to the roof and to "follow orders" once they arrived. (Id.) The East Dover firefighters grabbed their

[5] A SCBA unit is a breathing apparatus.

equipment and proceeded to the hangar elevator. (Id. at 86.) They went to the roof together with a NAES firefighter who was running the elevator. (Id.) A NAES officer, stationed in front of the elevator door, instructed the East Dover firefighters to leave the SCBA units near the elevator because this equipment was not needed. (Id. at 87.) A pile of such SCBA units had already been formed prior to their arrival on the roof. (Id. at 88.) Mark Roma testified in his deposition that he questioned the NAES officer regarding this order to leave behind his SCBA unit. (Id. at 89.) He stated that, despite his concern, he followed the instruction because the size of the pile indicated that the other firefighters currently on the roof also complied. (Id. at 87-90.)

Mark Roma began to assist in passing tools down a line of firefighters. (Id. at 96.) While in the passing line, a

NAES firefighter asked him to relieve a firefighter who was aiming a fire hose down a hole in the metal roof. (Id. at 98-99.) Mark Roma complied with this request. (Id.) He testified that shortly before he was relieved from this station, white steam-like smoke began to come out of the metal roof's hole and towards him, lasting a couple of minutes. (Id. at 101-02.) Mark Roma, upon being relieved, picked up his SCBA unit, proceeded down the elevator, and reported to the rehabilitation location. (Id. at 111-12.) The East Dover Volunteer Fire Department was then released from the scene. (Id. at 121.)

Mark Roma started to cough on the trip back to the firehouse. (Id. at 122.) He began to cough up blood after he arrived at the firehouse. (Id. at 123.) A first aid squad was summoned and transported him to the Community Medical Center where he was kept overnight for

observation. (Id. at 123, 126.) Mark Roma alleges that, since the fire, he has suffered from wheezing, hemolysis, chemical bronchitis, smoke inhalation, coughing up blood, severe chest irritation and discomfort, pulmonary problems, gastritis, hiatal hernia, shortness of breath, headaches, vomiting, restriction and irritation of the airway, and permanent damage to his lungs and lung function. (Second Am. Compl. at 6.)

Mark Roma filed an administrative claim, as required under the FTCA, alleging negligence on the part of Federal Defendants in instructing him to remove his breathing apparatus and asserting that his injuries resulted from this instruction. (Decl. of William M. Sexton dated 2-26-02 ("Sexton Decl.") Ex. C2: Standard Form 95 filed by Stephen M. Tatonetti on behalf of his client Mark

Roma dated 4-9-98 ("SF 95")) The United States denied his claim on July 22, 1999. (Sexton Decl. ¶ 6.)

Plaintiffs filed a Complaint with this Court on October 27, 1999. The initial Complaint names as defendants: (1) the United States; (2) the Department of the Navy; (3) the Naval Firefighter Captain; (4) Contractor John Does (1-10); (5) Fire Chief John Doe; (6) Battalion Chief John Doe; (7) John Does (1-10); and (8) John Doe Entities (1-10). (Compl. at 1.) The Magistrate Judge, in an Order filed on October 6, 2000, permitted Plaintiffs to file an amended complaint substituting additional named defendants for certain fictitious defendants. (Order filed 10-6-00.) This Amended Complaint, adding Jones and Vaspoli as defendants, was filed on October 30, 2000. (Am. Compl. at 1.) On January 19, 2001, the Magistrate Judge granted Plaintiffs leave to file another amended

complaint naming Wigand as a defendant in place of Contractor John Doe 2. (Order 1-19-01.)

Plaintiffs filed their Second Amended Complaint, naming Wigand as a defendant, on January 19, 2001. The Second Amended Complaint contains thirteen separate counts. (See generally Second Am. Compl.) Mark Roma essentially alleges that Moving Defendants, with the exception of the Naval Firefighter Captain, negligently and recklessly caused or failed to prevent the NAES fire. (See generally id.) He also claims that the Federal Defendants negligently or recklessly provided him with improper supervision and instructions. (See generally id.). Melanie Roma states a loss of consortium claim in Count Twelve. (Id. Count Twelve.) Count Thirteen seeks information under the Freedom of

Information Act ("FOIA"), 5 U.S.C. § 552. (Id. Count Thirteen.)

On February 16, 2001, Vaspoli filed an Answer to this Second Amended Complaint that included cross-claims for contribution and common law indemnification. (Answer filed 2-16-01.) The United States, Department of the Navy, and Naval Firefighter Captain filed their Answer, also asserting contribution and indemnification cross claims, on March 2, 2001. (Answer filed 3-2-01.) Vaspoli then submitted a Third-Party Complaint, alleging claims against third-party defendants William Green d/b/a Green Carpentry and Green Carpentry, Inc., which was filed on March 27, 2001. (Third-Party Complaint filed 3-27-01.) Jones filed an Answer to the Second Amended Complaint on April 5, 2001. (Answer filed 4-5-01.) This Answer included cross claims for contribution,

contractual indemnification, breach of contract, and common law indemnification as well as third-party claims against third-party defendant, Harleysville Insurance Company, t/a Harleysville Insurance of New Jersey ("Harleysville"). (Id.) On June 22, 2001, Harleysville filed an Answer to Jones's third-party claims. (Answer filed 6-22-01.)

Vaspoli filed its initial summary judgment motion on August 8, 2001. (Notice of Mot. filed 8-8-01.) Jones filed an identical motion for summary judgment on August 8, 2001. (Notice of Mot. filed 8-8-01.) The Court heard oral argument regarding these motions on September 4, 2001. On October 10, 2001, this Court entered an Order denying Vaspoli and Jones's motions for summary judgment without prejudice. (Order filed 10-10-01.) The Court denied these motions in order to

allow for the completion of discovery. (Id.) A Scheduling Order filed on December 4, 2001 indicated that discovery was to conclude on December 18, 2001. (Order filed 12-4-01.)

Vaspoli filed a notice of intent to submit a summary judgment motion on January 14, 2002. (Notice of Intent filed 1-14-01.) Federal Defendants likewise filed their own notice of intent on January 18, 2002. (Notice of Intent filed 1-18-02.) Both Vaspoli and Jones renewed their motions for summary judgment on February 15, 2002. (Notice of Mot. filed 2-15-02; Notice of Mot. filed 2-15-02.) Federal Defendants filed a motion for summary judgment on February 22, 2002. (Notice of Mot. filed 2-22-02.) Oral argument was heard on all three motions on March 18, 2002.

DISCUSSION

I. Introduction

Moving Defendants have raised the New Jersey Fireman's Rule as a defense. (Mem. in Supp. of Fed. Defs.' Mot. for Summ. J. ("Fed. Defs.' Br") at 28; Vaspoli's Br. in Supp. of Mot. for Summ. J. at 5.) Before addressing this common defense, the Court must consider two issues regarding Plaintiffs' claims against Federal Defendants. Federal Defendants note that, while Plaintiffs properly named the United States as a defendant, they erroneously named the Department of the Navy, an agency of the United States as an additional defendant. (Fed. Defs.' Br. at 21 n.4.) Federal Defendants further indicate that, because the Naval Firefighter Captain was acting within the scope of his federal employment at the time of the fire, he was also

improperly named as a defendant. (Id.) The Court therefore will dismiss Plaintiffs' claims against the Department of the Navy and the Naval Firefighter Captain. As requested by Federal Defendants (Id.), the Court will further dismiss any claims against any other John Doe defendant who was a federal employee. The Court will also dismiss Plaintiffs' FOIA claim in Count Thirteen of the Second Amended Complaint because Plaintiffs apparently admit that they have obtained the information they sought in that claim. (Pls.' Br. at 16.) After consideration of the Fireman's Rule, we then turn to the two additional grounds raised by Federal Defendants: (1) Plaintiffs' failure to exhaust administrative remedies under the FTCA; and (2) the availability of workers' compensation as Mark Roma's exclusive remedy under the special employer doctrine. (Fed. Defs.' Br. at 22-26, 32-38.)

II. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the initial burden of showing that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met that initial burden, the non-moving party must present evidence that establishes that a genuine issue of material fact exists, making it necessary to resolve the difference at trial. Id. at 324; Jersey Cen. Power & Light Co. v. Lacey Township, 772 F.2d 1103,

1109 (3d Cir. 1985). A non-moving party, rather than rely on mere allegations, must present actual evidence that creates a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

In deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The role of the judge at the summary judgment stage is not to weigh the evidence, but to determine whether there is a genuine issue for trial. Anderson, 477 U.S. at 249. "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Id. at 247-48.

Material facts are only those facts that might affect the outcome of the action under governing law. Id. at 248; Boyd v. Ford Motor Co., 948 F.2d 283, 285 (6th Cir. 1991). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50 (citations omitted).

III. New Jersey's Fireman's Rule

New Jersey's Fireman's Rule generally protects persons who unintentionally start fires fort tort liability to injured firefighters. See e.g., N.J.S.A. § 2A:62A-21. The rationale behind this rule was best stated by the New

Jersey Supreme Court in Krauth v. Geller, 31 N.J. 270, 157 A.2d 129 (1960):

> Probably most fires are attributable to negligence, and in the final analysis it would be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained with public funds to deal with those inevitable, although negligently created, occurrences.

Id. at 274, 157 A.2d at 131. The New Jersey Supreme Court held that "[t]he owner or occupier [of a premises] is not liable to a paid fireman for negligence with respect to the creation of a fire." Id. at 273, 157 A.2d at 130.

The Appellate Division of the New Jersey Superior Court extended this rule to volunteer firefighters in Ferraro v. Demetrakis, 167 N.J. Super. 429, 433, 400 A.2d 1227, 1229 (App. Div. 1979). In Ferraro, a volunteer firefighter died due to smoke inhalation. Id. at

431, 400 A.2d at 1228. The firefighter's widow argued that the Fireman's Rule did not apply because her husband was a volunteer firefighter and therefore did not receive financial compensation for his services. Id. at 433, 400 A.2d at 1229. In rejecting this argument the Ferraro court stated:

> The policy behind the rule is to acknowledge the nature of a fireman's duties as determining the scope of risks which he must be deemed to assume. A trained fireman faces the same dangers and must be deemed to assume the same risks whether he is a volunteer or salaried. Moreover, volunteer firemen are expressly covered by the worker's compensation law.

Ferraro, 167 N.J. Super. at 433, 400 A.2d at 1229.

In Rosa v. Dunkin' Donuts of Passaic, 122 N.J. 66, 583 A.2d 1129 (1991) the New Jersey Supreme Court, over a dissent by Justice Handler, ruled that the Fireman's Rule barred an action by a police officer who had suffered

injuries after slipping on powdered sugar at the scene of an emergency. Id. at 66, 583 at 1129. Justice Handler's dissent disagreed with the majority's holding that the Fireman's Rule precluded the recovery of damages for injuries resulting from acts of ordinary negligence that occurred within the course of the public safety officer's duty, even though unrelated to the incident which occasioned the presence of the officer. Rosa, 122 N.J. at 77-86, 583 A.2d at 1134-1140 [Handler, J., dissenting].

Following Justice Handler's criticism of the expansive scope of the rule adopted in Rosa, the New Jersey Legislature amended the Fireman's Rule. The new statute reads:

> In addition to any other right of action or recovery otherwise available under law, whenever any law enforcement officer, firefighter, or member of a duly incorporated first aid, emergency, ambulance or rescue squad association suffers any injury, disease

> or death while in the lawful discharge of his official duties and that injury, disease or death is directly or indirectly the result of the neglect, willful omission, or willful or culpable conduct of any person or entity, other than that law enforcement officer, firefighter or first aid, emergency, ambulance or rescue squad member's employer or co-employee, the law enforcement officer, firefighter, or first aid, emergency, ambulance or rescue squad member suffering that injury or disease, or in the case of death, a representative of that law enforcement officer, firefighter or first aid, emergency, ambulance or rescue squad member's estate, may seek recovery and damages from the person or entity whose neglect, willful omission, or willful or culpable conduct resulted in that injury, disease or death.

The amended Fireman's Rule was first applied by the New Jersey Appellate Division in Kelly v. Ely, 336 N.J. Super. 354, 764 A.2d 1031 (2001), certif.. denied, 167 N.J. 635, 772 A.2d 937 (2001). The plaintiff, a volunteer firefighter, tripped over a curb and injured himself while on the scene of a fire. Id. at 356, 764 A.2d at 1032. There was no evidence that the defendant had negligently

maintained the curb. Id. The plaintiff argued that the statute had abrogated the tort immunity historically afforded by the Fireman's Rule and that firefighters were permitted to recover damages upon a showing of ordinary negligence. Id. The Kelly court rejected plaintiff's argument, holding that the new statute's right of recovery was limited to claims that did not relate to the outbreak of the fire occasioning the firefighter's presence. Id. at 360, 764 A.2d at 1034. The Appellate Division stated that the statute allowed for recovery for acts of negligence "unrelated to and independent of, the onset of the fire." Id. at 361, 764 A.2d at 1034-1035. The Kelly court determined that the intention of the amendment was to:

> restore the law to its pre-Rosa state and afford protection to a firefighter injured as a result of negligence unrelated to and independent of, the onset of the fire.

Id. at 361, 764 A.2d at 1034. The Kelly court "consider[ed] it unlikely that the Legislature would have intended to enlarge the scope of a property owner's liability" and reasoned that the plaintiff's interpretation would "ignore the potential consequence of encouraging an owner to delay summoning aid out of fear of incurring liability to a responding firefighter." Id.

Moving Defendants have moved for summary judgment as to the issue of their liability for starting the fire. We hold that Vaspoli, Jones, and the United States are protected by the Fireman's Rule under these circumstances.

A defendant's willful and wanton misconduct is not protected by the Fireman's Rule. Mahoney v. Carus Chem. Co., 102 N.J. 564, 574, 510 A.2d 4, 9 (1986). Wilful and wanton misconduct implicates "an

extraordinary degree of culpability." Entwistle v. Draves, 102 N.J. 559, 561, 510 A.2d 1, 2 (1986). A plaintiff must show that the defendant committed "a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences." Id. (citations omitted). The plaintiff must demonstrate that the defendant "consciously and intentionally" committed the injurious act or omission with the awareness that the conduct would "likely or probably result" in injury. Mahoney, 102 N.J. at 574, 510 A.2d at 9 (citations omitted).

The record before this Court does not support Mark Roma's contention that defendants acted in a willful and wanton manner. Rather, the record establishes that all of the parties involved in the daily work and observation of the site in question went to great lengths to ensure that the

job was being done both safely and in accordance with prescribed specifications. Vaspoli, government quality assurance representatives, quality control representatives from Jones, and NAES fire inspectors visited the site on a daily basis. (Ruymann Decl. Ex. 7: Dep. of Keith McDonough dated 9-21-01 ("McDonough Dep.") at 7 & Ex. 6: Dep. of Harry Brown dated 11-13-01 ("Brown Dep.") at 33 & Ex. 8: Dep. of Buck Shimp dated 9-21-01 ("Shimp Dep.") at 10).

A general examination of each defendant's behavior prior to the fire does not support Mark Roma's assertion that any action by a defendant was willful and wanton.

1. Vaspoli

Vaspoli had been working on the site for approximately eight weeks (Vaspoli Dep. at 172), and had used the same

"chop saw" throughout the drainage job (Id.). He had complied with the standard operating procedure in force, and had retained a "hot permit" for the day of the fire from the NAES fire inspector. (Ruymann Decl. Ex. V-10: Hot Work Permit dated 11-24-97.) Vaspoli took precautionary measures, including placing buckets of water on the roof on days when the "chop saw" or other hot tools were being used (Vaspoli Dep. at 49), keeping fire extinguishers on hand (Id. at 29), and stationing a man inside the hangar to watch for falling ashes or smoldering scraps when they were using spark-producing torches. (Id. at 46.) He was unable to detect the existence of debris under any worksite before the removal of the specific roof panels. (Id. at 136-40.) Vaspoli had notified both Jones and federal officials regarding his

findings of debris between the two roofs (Id. at 64-66.), and had been told to proceed with caution. (Brown Dep. at 17.)

2. Jones

As the general contractor, Jones supervised the performance of the drainage work and maintained quality control representatives who visited the site several times a week. (Brown Dep. at 33.) In addition, Vaspoli, as required under its contract, sent daily reports to Jones. (Vaspoli Dep. at 66; Brown Dep. at 35.) Jones was engaged in other projects at NAES, and its employees made frequent visits to the site. (Certif. of Stephen M. Tatonetti, Esq., dated 2-7-02 ("Tatonetti Certif.") Ex. F: Dep. of Charles Sells dated 12-18-01 at 18.) Jones had ordered work on the roof to cease when debris was first discovered in order to await instructions from the NAES

fire inspectors. (Brown Dep. at 17.) After consultation with these fire inspectors, Jones was told to proceed with caution and to document anything encountered between the two roofs in the daily reports. (Id. at 15, 19.) Debris was only encountered three times, including the day of the fire, over a course of eight weeks. (Id. at 15.)

3. The United States

Federal officials also maintained close supervision of the site through fire inspection and quality assurance. (Shimp Dep. at 9-10; McDonough Dep. at 7.) Both fire inspectors and quality assurance representatives visited the site several times a week. (Shimp Dep. at 10; McDonough Dep. at 7.) They also received daily reports from Jones. (Brown Dep. at 35.) Quality assurance representatives and fire inspectors were made aware of the existence of the debris, and they did not perceive its

presence as presenting a significant risk. (McDonough Dep. at 13.) The quality assurance representatives assigned to the job also did not see the use of the chop saw as a fire hazard. (Id. at 22-24.)

Plaintiffs contend that, as Vaspoli, Jones, and the United States knew that debris had been found on two occasions before the fire, they intentionally disregarded a known risk in order to finish the job in a speedy fashion and thereby acted willfully and wantonly. (See, e.g., Pls.' Br. at 22 & 30.) This Court, however, finds that the record presents, at the very best, a case of ordinary negligence. "The bar of the fireman's rule may not be avoided by recasting merely negligent conduct as willful and wanton." Entwistle, 102 N.J. at 561, 510 A.2d at 2. Plaintiffs have failed to satisfy their burden of proving the presence of a genuine issue of material fact as to the

conduct of any defendant. Jersey Cent. Power & Light Co., 772 F.2d at 1109. Accordingly, summary judgment will be granted in favor of Moving Defendants as to Plaintiffs' claims based on alleged liability of Vaspoli, Jones, and the United States for starting or failing to prevent the fire.[6].

IV. Lack of Subject Matter Jurisdiction: The FTCA

A. Administrative Claim Submission Requirement

"It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued. . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" United States v. Mitchell, 445 U.S. 535, 538 (1980) (quoting United

[6]. The Court notes that this Fireman's Rule analysis requires the dismissal of not only Mark Roma's claims based on the fire itself but also Melanie Roma's loss of consortium claim in Count Twelve insofar as it is premised on these same grounds of liability.

States v. Sherwood, 312 U.S. 584, 586 (1941); Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475 (1994)). Congress waived sovereign immunity under certain circumstances in the FTCA, 28 U.S.C. §§ 1346(b), 2671-80. Section 1346(b) gives a district court

> exclusive jurisdiction of civil actions on claims against the United States, for money damages . . for injury of loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b); see also United States v. Muniz, 374 U.S. 150, 152-53 (1963); Deutsch v. United States, 67 F.3d 1080, 1091 (3d Cir. 1995). Cognizable claims under section 1346(b) include those that are:

> (1) against the United States, (2) for money damages, . . . (3) for injury or loss o

> property, . . . (4) caused by the negligent or wrongful act or omission of any employee of the Government (5) while acting within the scope of his office or employment, (6) under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Deutsch, 67 F.3d at 1091 (quoting 28 U.S.C. § 1346(b)); see also Fed. Deposit Ins. Corp., 510 U.S. at 477; Muniz, 374 U.S. at 150.

The FTCA bars a claimant from bringing suit in a district court unless he or she has first exhausted administrative remedies. See 28 U.S.C. § 2675(a); McNeil, 508 U.S. at 111; Deutsch, 67 F.3d at 1091. 28 U.S.C. § 2675(a) specifically provides that:

> [a]n action shall not be instituted upon a claim against the United States for money damages . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The

> failure of an agency to make final disposition of a claim within six months after it is filed, shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.

A tort claim against the United States is also time-barred unless a claimant presents the claim in writing to the appropriate federal agency within two years after the claim accrues and files the action in the district court within six months of notice by certified or registered mail of a final decision of the claim by the agency to which it was presented. See 28 U.S.C. § 2401(b); Pascale v. United States, 998 F.2d 186, 190 (3d Cir. 1993).[7] The requirements that a claimant timely present a claim in

---

[7] 28 U.S.C. § 2401(b) reads in pertinent part:

> A tort claim against the United States shall be forever barred unless it is presented to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

writing for a sum certain are jurisdictional prerequisites to a suit in the district court and cannot be waived. See, e.g., Deutsch, 67 F.3d at 1091; Bilowas v. United States, 443 F.2d 1047, 1049 (3d Cir. 1971).

Federal Defendants argue that, because Melanie Roma never submitted an administrative claim regarding her loss of consortium damages, her claim must be dismissed for lack of jurisdiction. (Fed. Defs.' Br. at 25-26.) In actions under the FTCA, fulfillment of the exhaustion of administrative remedies requirement has long been held to be a prerequisite for subject matter jurisdiction. Deutsch, 67 F.3d at 1091; Bilowas, 443 F.2d at 1049. The spouse of a party seeking recovery under the FTCA must file a separate administrative claim to establish federal jurisdiction. Schwartzman v. Carmen, 995 F. Supp. 574, 576 (E.D. Pa. 1998) (holding that, absent facts

placing agency on notice of both spouses' claims, single claim submitted by one spouse is insufficient to present the claim of other spouse); see also McDevitt v. United States, 963 F. Supp. 482, 485 (E.D. Pa. 1997); Dondero v. United States, 775 F. Supp. 144, 148-49 (D. Del. 1991).

This Court finds that Melanie Roma's loss of consortium claim in Count Twelve of the Second Amended Complaint must be dismissed due to her failure to comply with the FTCA's administrative claim requirement. Deutsch, 67 F.3d at 1091; Bilowas, 443 F.2d at 1049. Plaintiffs assert that a separate administrative claim on Melanie Roma's behalf was never filed because of limited information provided by Federal Defendants as to the extent of their negligence. (Pls. Br. at 39.) However, knowledge as to the extent of Federal Defendants' alleged negligence was not

necessary to file a loss of consortium claim. A person can presumably determine whether he or she has lost the companionship and consortium of a spouse without knowing the extent of the other party's negligence, and this determination can be made within the filing period. In any case, equitable considerations also cannot alter the administrative prerequisites mandated under the FTCA. The Third Circuit stated in Peterson v. United States, 694 F.2d 943 (3d Cir. 1982) that:

> In the Federal Tort Claims Act, Congress waived the sovereign immunity of the United States. However, the injured person must comply with the applicable terms and the conditions prescribed by Congress, including strict observance of the limitations period, which cannot be extended by equitable considerations.

Id. at 944-45. The Court therefore cannot excuse Melanie Roma's failure to comply with the filing requirement

because of her alleged lack of knowledge regarding a consortium claim against Federal Defendants.

Mark Roma's claim that the Federal Defendants were negligent or reckless in starting or failing to prevent the fire must be dismissed due to his failure to file the requisite administrative claim alleging this distinct cause of action. Bilowas, 443 F.2d at 1049. Although Mark Roma filed another administrative claim regarding the same event (SF 95), he also had to file a separate claim for this other cause of action. His filed claim referred only to alleged negligence regarding the instruction to remove his breathing apparatus, and it failed to mention any assertion of alleged wrongdoing in starting or failing to prevent the fire. (Id.) Even if the Fireman's Rule did not apply in these circumstances, any claim by Mark

Roma for negligence in starting the fire must be dismissed for failure to comply with the administrative claim requirements of the FTCA. Peterson, 694 F.2d at 945 n.5; McNeil, 508 U.S. at 111.

V. Special Employment Status

Mark Roma's claim against the United States for negligent or reckless supervision and instruction must be dismissed under New Jersey's special employer doctrine. New Jersey law provides that an employee's exclusive remedy against an employer for ordinary work injuries is a statutory remedy without regard to fault. N.J.S.A. § 34:15-1 et seq.; Gore v. Hepworth, 316 N.J. Super. 234, 240 720 A.2d 350, 353 (App. Div. 1998). In return, the employee forgoes a common-law tort remedy, making the employer immune for any negligence or even

recklessness related to that incident. See N.J.S.A. § 34:15-8;[8] Eger v. E.I. Du Pont DeNemours Co., 110 N.J. 133, 137, 539 A.2d 1213, 1215 (1988); Wilson v. Faull, 27 N.J. 105, 116, 141 A.2d 768, 774 (1958); Gore, 316 N.J. Super. at 240, 720 A.2d at 353; McGovern v. Resorts Int'l Hotel, Inc., 306 N.J. Super. 174, 177-81, 703 A.2d 364, 366-68 (App. Div. 1991). The New Jersey Workers' Compensation Act expressly covers volunteer firefighters. N.J.S.A. § 34:15-43. Mark Roma presently receives $992.00 every two weeks through the Dover Township Board of Fire Commissioners. (Roma Dep. at 180-83.) An employee may have two employers, both of whom may be liable under the workers' compensation

---

[8]. New Jersey statutory law provides:

> If an injury or death is compensable under this article, a person shall not be liable to anyone at common law or otherwise on account of such injury or death for any act or omission occurring while such person was in the same employ as the person injured or killed, except for intentional wrong.

doctrine. See Blessing v. T. Shriver & Co., 94 N.J. Super. 426, 429-30, 228 A.2d 711, 713 (App. Div. 1967). Recovery against one employer bars the employee from maintaining a tort action against the other for the same injury. Id. "'Whether the common law [tort] action is precluded [by the borrowed-employee doctrine] is . . . dependent upon a determination that the borrower of an employee is, in fact, a special employer.'" Gore, 316 N.J. Super. at 240, 720 A.2d at 353 (quoting Volb v. G.E. Capital Corp., 139 N.J. 110, 116, 651 A.2d 1002, 1004-05 (1995)); see also Blessing, 94 N.J. Super. at 434, 228 A.2d at 715 (noting that determination of special-employer relationship is fact-sensitive inquiry).

In determining whether an entity that borrows an employee's services from a general employer is a "special" employer for purposes of workers'

compensation immunity, three factors are considered under New Jersey law: (1) whether the employee has made a contract for hire, express or implied, with the borrowing employer; (2) whether the work being done is essentially that of the borrowing employer; and (3) whether the borrowing employer has the right to control the details of the work. Volb v. G.E. Capital Corp., 139 N.J. at 116, 651 A.2d at 1005. The right to control the borrowed employee's work is the most important factor. Id. Some New Jersey courts also examine two additional factors: (1) whether the borrowing employer pays the employee's wages; and (2) whether the borrowing employer has the power to hire, discharge, or recall the employee. Gore, 316 N.J. Super. at 240-41, 720 A.2d at 354; Kelly v. Geriatric & Med. Servs., 287 N.J. Super. 567, 572, 671 A.2d 631, 633 (App. Div.), aff'd, 147 N.J. 42, 685 A.2d 943 (1996) (per curiam). An employer is

not required to pay the employee's wages and possess to power to hire, discharge, or recall the employee in order to constitute a special employer. Rudenjak v. GPA Nuclear, No. 89-3509, 1991 WL 210852 at *2 (D.N.J. Oct. 11, 1991); see also Volb, 139 N.J. at 116, 651 A.2d at 1005 (stating that New Jersey has adopted three-factor test for determining special-employment relationship). The term "employee" should be construed liberally to bring as many cases as possible within the coverage of the worker's compensation laws. Santos v. Standard Havens, Inc., 225 N.J. Super. 16, 25, 541 A.2d 708, 712 (App. Div. 1988).

Turning to the most important "right to control" factor, Plaintiffs contend that, even though Mark Roma was under the control of NAES personnel while on the scene of the fire, he technically only had to follow the orders of

his own fire company's supervisors and that his supervisors had the option to accept or deny assignments. (Pls.' Br. at 39.) Plaintiffs, however, acknowledge that: (1) his East Dover Volunteer Fire Department supervisor, Chlebowski, accepted NAES's requests for assistance (Roma. Dept. at 82); (2) Chlebowski ordered East Dover firefighters to follow instructions given by NAES personnel (Id.); and (3) Mark Roma did in fact follow the orders given to him by various NAES personnel (Id. at 79-80, 81-82, 87-89, 91, 99; Ruymann Decl. Ex. R-4: Statement of Mark Roma dated 9-14-01). The right of NAES's fire personnel to control Mark Roma's actions is also clearly established by the Mutual Aid Agreement between the East Dover Volunteer Fire Department and

NAES. On September 22, 1983, the Board of Fire Commissioners, District #1, Dover Township[9]. entered into a Mutual Aid Agreement with the Department of the Navy, NAES Lakehurst Fire Department. (Strasser Decl. Ex. 1: Mutual Aid Agreement at 2). Paragraph (6) of that agreement states that in the event that mutual aid is rendered:

> The senior officer of the fire department of the requesting service shall assume full charge of the operations. However, under procedures agreed to by the technical heads of the fire departments involved, a senior officer of the department furnishing the assistance may assume responsibility for the coordination of the overall operation.

(Id.) The record fails to suggest that Chlebowski or any other East Dover firefighter assumed responsibility for the coordination of the hangar fire or that the requisite

---

[9]. The Board of Fire Commissioners, District #1, Dover Township includes four fire companies: Toms River Volunteer Fire Co #1, Toms River Volunteer Fire Co #2, Ocean Beach Volunteer Fire Co., and the East Dover Volunteer Fire Co. (Strasser Decl., ¶2.)

procedures for any such assumption even existed at the time of the fire. The Mutual Aid Agreement and the actual occurrences on the day of the fire therefore establish that NAES fire personnel directed and oversaw Mark Roma.

The test for whether an implied contract of hire exists is whether "the employee consents to the special employment relationship ... [and] voluntarily submit[s] to the employer's direction and control. Antheunisse v. Tiffany & Co., 229 N.J. Super. 399, 403, 551 A.2d 1006, 1008 (App. Div. 1988) (citations omitted). Plaintiffs contend that the Mutual Aid Agreement does not constitute an express or implied contract because Mark Roma is not a direct party. (Pls.' Br. at 39.) The existence of an express or implied contract, however, can be proven without relying on the Mutual Aid Agreement.

Upon arrival to the NAES, Mark Roma's fire company parked its truck outside Station 63, and Chlebowski was debriefed by NAES fire personnel. (Roma Dep. at 76.) Chlebowski, following the instructions of NAES personnel, ordered three of his firefighters, including Mark Roma, to report to the NAES captain. (Id. at 77.) Mark Roma followed Chlebowski's command and reported to the NAES captain's position, wherein he received the first of several NAES orders. (Id.) By accepting Chlebowski's order to report to and follow the direction of the NAES captain, Mark Roma consented to work under the control of the NAES officers. He thus satisfied both prongs of the test: (1) he consented to the special-employment relationship; and (2) he voluntarily submitted to the borrowing employer's control.

Accordingly, Mark Roma's actions established an implied contract of employment.

The final mandatory factor under the Volb test is that the work being performed is essentially that of the borrowing employer. In evaluating that factor, New Jersey law looks to: (1) whether there is substantial economic dependence on the putative employer;[10] and (2) whether there is a functional integration of the employee's work and the borrowing employer's work. Santos, 225 N.J. Super. at 23, 541 A.2d at 711. A special employment relationship exists if the work done by the borrowed employee "was an integral part of the regular business" of the borrowing employer. Rossnagle v. Capra & Shell Oil Co., 127 N.J. Super. 507, 517, 318

[10]. Because Mark Roma is a volunteer firefighter who does not receive compensation for his services, this element is not applicable in this context.

A.2d 25, 30 (App. Div. 1973), aff'd, 64 N.J. 549, 318 A.2d 20 (1974) (per curiam) Clearly, fighting a fire on the NAES base is an "integral part of the regular business" of the NAES firefighters. Mark Roma's participation in fighting the hangar fire can also been seen as involving the integration of his work and the work of the NAES fire personnel. Santos, 225 N.J. Super. at 23, 541 A.2d at 711.

In opposing the motion for summary judgment, plaintiff maintains that a special employer relationship cannot be established because of the two additional factors regarding payment of wages and the power to hire, discharge, or recall. (Pls.' Br. at 31-41.) As the Court previously noted, satisfaction of the last two factors is not required to find that an employer is a special employer. Rudenjak, 1991 WL 210852 at *2; see also Volb, 139

N.J. at 116, 651 A.2d at 1004. Accordingly, the record establishes that Mark Roma was a special employee of the United States. Due to the existence of the special employer relationship, Mark Roma is barred from suing the United States for negligent or reckless supervision and instructions, and his claims based on such a theory of liability will be dismissed with prejudice.

CONCLUSION

Plaintiffs have been unable to establish the existence of any issues of genuine fact regarding the three distinct summary judgment motions before this Court. Plaintiffs' claims against the Department of the Navy, the Naval Firefighter Captain, and any other John Doe defendants who were federal employees must be dismissed. The Court likewise must dismiss Plaintiffs' FOIA claim because they have already obtained the requested

information. The Fireman's Rule bars Plaintiffs' claims for starting or failing to prevent the fire against Vaspoli, Jones, and the United States. The FTCA's administrative filing requirements and the existence of a special employer relationship mandate the dismissal of the remaining claims against the United States. Accordingly, the defendants are entitled to summary judgment as a matter of law, and the Court will dismiss with prejudice all counts in the Second Amended Complaint against the United States, the Department of the Navy, the Naval Firefighter Captain, Vaspoli, Jones, and any John Doe defendant who was a federal employee.

IT IS THEREFORE on this 5th day of September, 2002, **ORDERED** that the motion of defendants the United States of America, the United States Department of the Navy, and Naval Firefighter Captain John Doe for summary judgment (no. 49-1 on the docket; 43-1 notice of intent) be and hereby is **GRANTED**; and

IT IS FURTHER ORDERED that the motion of defendant Vaspoli Custom Builders, Inc. t/a Vaspoli Custom Builders for summary judgment (no. 44-1 on the docket; no. 42-1 notice of intent) be and hereby is **GRANTED**; and

IT IS FURTHER ORDERED that the motion of defendant J.A. Jones Management Services t/a Jones Management Services for summary judgment (no. 45-1 on the docket) be and hereby is **GRANTED**; and

IT IS FURTHER ORDERED that all claims in the Second Amended Complaint of plaintiffs Mark Roma and Melanie Roma against the United States of American, the United States Department of the Navy, Naval Firefighter Captain John Doe, Vaspoli Custom Builders, Inc. t/a Vaspoli Custom Builders, J.A. Jones Management Services t/a Jones Management Services, and any John Doe defendant who was a federal employee be and hereby are **DISMISSED WITH PREJUDICE;** and

IT IS FURTHER ORDERED that the parties shall **SHOW CAUSE** on October 7, 2002, why any remaining claims in the first-party action, claims in the third-party actions, and cross claims should not be dismissed in their entirety as moot, thereby closing this case; and

IT IS FURTHER ORDERED that the parties observe the following briefing schedule:

September 18, 2002	Plaintiffs' Response to the Order to Show Cause
September 27, 2002	Responses to the Order to Show Cause on behalf of all other parties
October 4, 2002	Reply papers from any party; and

IT IS FURTHER ORDERED that the Order to Show Cause will be decided on the papers without oral argument pursuant to Federal Rule of Civil Procedure 78 unless otherwise directed by the Court prior to the return date.

./s/ Mary L. Cooper

Mary L. Cooper

United States District Judge